UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

COLORADO SYMPHONY ASSOCIATION

and	**Case Nos.**	**27-CA-140724**
		27-CA-155238
		27-CA-161339
		27-CA-179032

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, AFL-CIO/CLC

RESPONDENT COLORADO SYMPHONY'S REPLY TO COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF

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INTRODUCTION

On February 14, 2017, ALJ Carter issued his Decision and Recommended Order ("Decision") finding that CSA violated the Act. On March 14, 2017, the Colorado Symphony Association ("CSA") filed a Statement of Exceptions ("Exceptions") and Brief in Support of Exceptions ("Brief"), which argued the Decision must be reversed because ALJ Carter disregarded the record, made erroneous credibility findings, erred in applying the relevant law, and, in some cases, completely disregarded governing legal precedent.

On April 11, 2017, Counsel for the General Counsel ("CGC") filed an Answer to CSA's Exceptions ("CGC Answer").[1] Throughout its Answer, CGC fails to address CSA's arguments and diminishes the errors in ALJ Carter's Decision. CGC attempts to avoid the impact of significant facts and evidence by either misconstruing the evidence entirely or simply ignoring its existence. CGC's tactics are insufficient to salvage ALJ Carter's Decision. The Decision must be reversed.

ARGUMENT

A. ALJ Carter Erred In Finding AFM Is The Representative Of CSA's Musicians.

CGC argues at length that AFM and DMA were recognized as joint representatives. CSA Answer, pp. 22-27. There is no evidence supporting this assertion. Like ALJ Carter, CGC does not face – or even address – the significant deficiencies in the recognition clause of the IMA. Indeed, neither ALJ Carter nor CGC resolve the fact that the recognition clause does not describe 9(a) status, nor does it use any language indicating AFM is a lawful majority representative. Without a showing of majority support, CGC is unable to sustain its burden of proving AFM had lawful 9(a) status. *See Staunton Fuel & Material, Inc.*, 335 NLRB 717, 720

[1] Also on April 11, 2017, AFM filed an Answer to CSA's Exceptions ("AFM Answer"). CSA files a separate Reply which addresses AFM's Answer.

(2001) (holding that the union failed to meet its burden to prove 9(a) status because the recognition language in relevant collective bargaining agreement did not "state that the Respondent's recognition was based on a contemporaneous showing, or offer by the Union to show, that the Union had majority support.").

CGC's attempt to avoid the recognition clause's deficiencies by arguing that a specific statement of majority recognition is only required in the construction industry is contrary to law. There is no basis to distinguish cases like *Staunton* which arise in the construction industry because the issue in that case – like the issue here – is whether the union properly achieved 9(a) status. *See Staunton*, 335 NLRB at 719-20. Where the purported recognition took place is immaterial; it must be lawful.

Rather than face the recognition clauses' deficiencies head on, CGC continues to rely on *Musical Arts Ass'n.*, 356 NLRB 1470 (2011). The facts of that case are inapposite. For example, unlike the judge in that case, ALJ Carter concluded he could not rely on AFM's bylaws to bind CSA. 7 ALJD fn. 11. CGC has not excepted that point and, therefore, it may not be disturbed by the Board. Moreover, in *Musical Arts*, the symphony and union had a history of meeting to bargain substantive issues since 1967. *Id.* at 1480-83. There is no such history here. Thus, ALJ Carter and CGC's continued reliance on that case is improper.

In yet another effort to dodge the shortcomings of the IMA, CGC relies on the IMA's preamble. CGC's Answer, p. 30. The preamble, however, is not a recognition clause. CGC's reference to irrelevant boilerplate language in the preamble only emphasizes the insufficiency of the recognition clause.

The IMA's recognition clause covers only musicians "who are employed by the Employer in the creation of audio and audio-visual media *covered by this Agreement* . . ." GC

Ex. 2, Article II, p. 2. There is no evidence CSA employed musicians who performed projects "in the creation of audio and audio-visual media covered by [the IMA]" when CSA executed the IMA. Tr. 399:6-25; 400:1-25; 401:1-25; 402:1-25; 403:1-25; 404:1-25; 405:1-16. Because CSA did not employ musicians performing work covered by the recognition clause at the time the IMA and its predecessor agreements were executed, they are unlawful pre-hire agreements and void *ab initio*.

Finally, CGC misconstrues the evidence relating to the members-only nature of the IMA.[2] CGC Answer, pp. 31-33. It is undisputed the IMA requires all musicians performing work for CSA to be a member of AFM. GC Ex. 2, Article III, p. 2. Newmark similarly testified that any musician performing services under the IMA had to comply with the Union Security provision and become a member of AFM. Tr. 406:12-23. Thus, the IMA is unlawful and CSA was not obligated to bargain with AFM.[3] *See* Brief, pp. 13-15.

B. ALJ Carter Erred In Finding CSA's October 20 Implementation Violated The Act.

CGC engages in a variety of legal and factual gymnastics in an effort to piece together a plausible theory that AFM negotiated with CSA in good faith when the overwhelming weight of the evidence is to the contrary. CGC's efforts must be rejected. CGC argues ALJ Carter's Decision should be upheld because he credited Hair and Blumenthal's testimony regarding Blumenthal and Newmark's bargaining authority and discredited Bartels' testimony regarding Hair's statements during the August 2014 breakfast. CGC Answer, p. 52. CGC misses the point. "Unlike the requirement for an impasse defense that both parties perceive their bargaining

[2] CGC also states, "[a]dmittedly, there is affirmative record evidence that a Colorado Peace Act election took place." CGC Answer, p. 33. It is unclear if this sentence was intended to state "there is *not* affirmative evidence . . . ." Regardless, the undisputed evidence presented was that AFM never participated in any election with regard to CSA's musicians. Tr. 931:13-22; 1065:21-25; 1066:1-9.

[3] CGC's 10(b) argument ignores the fact that the IMA is void *ab initio* and, therefore, the limitations period never began to run. *Compare* CGC Answer, pp. 27-29, *with* Brief, pp. 11-13.

to be at a point of deadlock, in analyzing the validity of a dilatory bargaining defense, a single party's perception of the other party's tactics is a relevant consideration in determining whether unilateral implementation is a lawful act." *Serramonte Oldsmobile, Inc.*, 318 NLRB 80, 100 (1995) (quoting *Southwestern Portland Cement Co.*, 289 NLRB 1264, 1272 fn. 9 (1988)). Thus, it is entirely irrelevant whether ALJ Carter credited Hair and Blumenthal or discredited Bartels. The relevant inquiry is CSA's perception of AFM's conduct and statements.

Following months of refusals and delays, the undisputed fact is Blumenthal and Newmark acted in bad faith on August 20, 2014 by not coming prepared to bargain and using the time as a "question and answer session." Tr. 232:23-25; 233:1-4; 255:25; 256:1-9. Also during that meeting, Blumenthal and Newmark stated they would not negotiate and, in fact, after being instructed by ALJ Carter at trial to respond to CSA's question, Newmark admitted she and Blumenthal did not have the authority to negotiate with CSA regarding its ability to perform commercial work. Tr. 472:25; 473:1-13; 717:21-25; 729:2-17.

Moreover, although it was improper to discredit Bartels' testimony,[4] CGC concedes Bartels informed Kern in August 2014 that AFM "was willing to bargain about symphonic media, but would not bargain commercial media." CGC Answer, p. 11. Thus, regardless, it cannot be disputed that CSA in good faith believed AFM would not negotiate regarding its ability to perform commercial work. The combination of Blumenthal and Newmark's statements and conduct during the August 20, 2014 meeting coupled with Bartels' report to Kern require the conclusion that AFM engaged in bad faith bargaining and privileged CSA to implement its

[4] CGC's attempt to discredit Bartels "because the union of which he is a principle would stand to gain if the AFM's [*sic*] lost this case and his Petition was reinstated" fails. *See* Answer, p. 19. The same is true for *all* of the AFM witnesses: Hair, Blumenthal, and Newmark are "principles" in AFM and stand to gain if AFM wins this case. Thus, to the extent Bartels' testimony is discounted because he stands to gain by the outcome of this case, so too should Hair, Blumenthal, and Newmark's testimony.

proposal.[5] *See Detroit Typographical Union No. 18 v. N.L.R.B.*, 216 F.3d 109, 119 (D.C. Cir. 2000); *Sw. Portland Cement Co.*, 289 NLRB 1264, 1273 (1988).

Ultimately, CGC attempts to blame AFM's bad faith conduct on CSA's refusal to provide the requested information. CGC Answer, pp. 54-56. This argument entirely ignores AFM's eight month campaign of explicitly refusing to meet with CSA on an individual basis. Brief, pp. 17-19. Moreover, AFM cannot cure its eight months of admitted bad faith and delay tactics by responding to one information request and appearing at one bargaining session for little more than two hours, without the authority to bargain, and only using that period as a question and answer session.[6] *See* Brief, pp. 42-43. Indeed, even if AFM had the information it requested, it would not have made a counterproposal because it was using the August 20, 2014 meeting as an information gathering session, not as a bargaining session. Tr. 637:9-12.

CGC also adopts ALJ Carter's demonstrably false finding that the parties discussed the request for information at the beginning of the day on August 20, 2014. CGC Answer, p. 10. As outlined in the Brief, however, the *only* evidence on this point is that Blumenthal did not comment on the request for information until the *very end of the day*. Tr. 1195:1-10; R. Ex. 32, CSA 001622, 001633. Neither CGC nor ALJ Carter are permitted to ignore the *actual* evidence in favor of their preferred evidence. Moreover, CGC's failure to face the undisputed facts as they were admitted is an admission that the actual evidence is fatal to its case.

[5] CGC's effort to disregard AFM's bad faith conduct in 2015 by arguing it is irrelevant to the 2014 implementation and simultaneous attempt to bolster AFM's conduct in 2014 by arguing it acted in good faith in 2015 must be rejected. CGC Answer, pp. 53-54.

[6] CGC argues the parties were not at impasse. CGC Answer, pp. 47-51. CSA does not address that issue herein due to space constraints. CSA continues to assert the parties were at impasse because AFM insisted that CSA agree to comply with the Commercial Agreements, which amounts to an insistence on the permissive subject of the scope of the bargaining unit. *See* Brief, pp. 47-49.

C. ALJ Carter Erred In Finding CSA Unlawfully Failed To Provide Information.[7]

There is no dispute CSA had a reasonable interest in keeping the requested information confidential. 56 ALJD 4-10; Tr. 430:2-4; 1164:24-25; 1165:1-4; CGC Answer, p. 41. Despite this finding, ALJ Carter failed to analyze the parties' respective good faith in bargaining over the Confidentiality Agreement. CGC attempts to enforce ALJ Carter's faulty analysis by arguing CSA's confidentiality concerns were adequately addressed by the restrictions in which AFM agreed. CGC Answer, p. 41. AFM is not permitted to insist CSA execute the Confidentiality Agreement AFM desires. Rather, AFM is required to negotiate in good faith regarding a mutually agreeable Agreement. *See Silver Bros. Co., Inc.*, 312 NLRB 1060, 1062 (1993) (once an employer's confidentiality concerns are expressed, it is "entitled to discuss [those] confidentiality concerns regarding the information request with the Union so as to try to develop mutually agreeable protective conditions for its disclosure to the Union."). The overwhelming evidence demonstrates AFM refused to do so.

CGC attempts to avoid the fatal impact Polach's proposed monetary damages provision has on AFM's purported good faith by misconstruing the record. Polach did not, in fact, testify that the inclusion of the monetary damages provision was an "oversight" as CGC alleges. *Compare* CGC Answer, p. 41 fn. 9, *with* Tr. 1593:3-4 (admitting she "sent" a draft Agreement with a monetary damages provision). Moreover, and, perhaps more importantly, Polach never told CSA such provision was an "oversight" at the time. Because Polach initially proposed a monetary damages provision and then, without explanation, refused to agree to such a provision, AFM's conduct was regressive and in bad faith. *See Mid-Continent Concrete*, 336 NLRB 258, 260 (2001) ("Where the proponent of a regressive proposal fails to provide an explanation for it,

[7] CSA addresses the relevance issues in its Reply to AFM's Answering Brief.

or the reason appears dubious, the Board may weigh that factor in determining whether there has been bad-faith bargaining."), *enfd*. 308 F.3d 859 (8th Cir. 2002).

AFM's purported reasoning for not agreeing to the damages provision is also nonsensical and further evidences its bad faith. As CGC explains, "AFM was ultimately not willing to additionally risk expensive litigation over the causes of any business opportunities lost by Respondent just to get information for bargaining, nor should any union have to." CGC Answer, p. 41. CGC's explanation of AFM's concern, however, does not make sense in light of their failure to propose any alternatives. If AFM was really concerned with risking "expensive litigation" then it would have proposed reasonable provisions to limit such risk, such as an attorney fee shifting provision, a cap on damages, or a liquidated damages provision.

CGC also adds that CSA "cannot show that a damages provision provides protection in addition to that which the Union has already agreed."[8] CGC Answer, p. 42. First, like with CGC's other assertions, this claim is nonsensical. The very reason parties include a damages provision in a contract is to deter a breach. Second, it is entirely irrelevant whether CGC thinks the damages provision provided extra security; it is the parties' prerogative – not CGC's – to decide what provisions will be included. The only issue is whether the parties acted in good faith by negotiating such a provision. *See Colgate-Palmolive Co.*, 261 NLRB 90 (1982). There can be no question CSA did and AFM did not.

CGC's reliance on *PCA Industries, Inc.*, 1995 WL 1918057 (N.L.R.B. Div. of Judges) (1995) is also misplaced. *See* CGC Answer, pp. 43-44. In contrast to that case, CSA did not

[8] CGC also argues AFM's June 2016 request for information was relevant to "calculating the wages owed under the expired IMA status quo, or to determining how musicians were actually compensated." CGC Answer, p. 45. Thus, AFM's request was intended to discover evidence to prosecute a grievance. *See* CGC Answer, p. 45 (arguing that AFM needed the information to determine whether CSA complied with the IMA). AFM may not utilize an information request as a discovery tool. *See Unbelievable, Inc.*, 318 NLRB 857, 877 (1995); *Union-Tribune Publishing Co.*, 307 NLRB 25, 26 (1992).

insist on any specific language at all. Indeed, it is undisputed that CSA was willing to negotiate regarding the parameters of the monetary damages clause. Tr. 1166:23-25; 1167:1-10; 1211:11-23. AFM, however, never made a counterproposal and refused to negotiate regarding that provision. Tr. 472:1-22; 948:2-5.

Ultimately, when the Board takes a step back and views the Confidentiality Agreement issue in full it becomes clear that CSA attempted to negotiate the Agreement and good faith and AFM refused to do so. In particular, AFM initially proposed a monetary damages provision and then, without explanation, refused to agree to such a provision. Then, at every turn when CSA raised the Confidentiality Agreement, AFM refused to make any counterproposals or suggest any provisions that would address its purported concerns. Instead, AFM remained steadfast in its "no" response and stonewalled CSA's efforts. Indeed, although Blumenthal stated at the end of the August 20th meeting that AFM wanted the information it requested, he simultaneously admitted he did not have the authority to discuss the Confidentiality Agreement.[9] Tr. 1202:3-15. AFM's conduct amounts to nothing more than executing its draft Confidentiality Agreement and then refusing to negotiate with CSA regarding the provisions of the Agreement. AFM's obstructionist tactics must not be rewarded by the Board. *See N.L.R.B. v. St. Joseph's Hospital*, 755 F.2d 260, 264-65 (2d Cir. 1985) (holding that the Board ignored the employer's many attempts to discuss the issue with the union and the union's unwillingness to bend in response, and noting the union refused to explain why it viewed the employer's requested accommodation as unacceptable "without advancing a single specific objection."). CGC's Answer highlights ALJ Carter's refusal to consider the evidence of the Union's bad faith.

[9] CGC explicitly relies on AFM's request for the information during the August 20, 2014 meeting but conspicuously ignores the undisputed evidence that Blumenthal stated he did not have authority to discuss the Confidentiality Agreement. CGC Answer, p. 4. CGC's repeated attempts to manipulate the record and omit evidence it does not like must not be permitted.

D. The ALJ Erred In Finding CSA Unilaterally Changed Employees' Terms And Conditions By Performing Certain Projects.

CGC's arguments that CSA unilaterally changed employees' terms and conditions by performing certain projects misses the mark and ALJ Carter's Decision must be reversed on this point. In particular, any finding that CSA violated the Act based on its performance of these projects is barred by Section 10(b).

CGC asserts the allegations relating to Oh Heck Yeah are not time barred because "although the face of the charge does not allege [this allegation] with specificity" the Complaint allegations were related to the allegations in the charge. CGC Answer, pp. 61-62. CGC's argument fails. Neither AFM nor CGC presented any evidence at trial that the charge's vague language had anything whatsoever to do with CSA's performance of commercial media projects. A charging party's vague allegations in a charge relating to a respondent's general alteration of employees' terms and conditions must not be permitted to cover any and every potential violation of the Act. Otherwise, employers would simultaneously be unable to identify the full scope of allegations against it and would be subject to liability for claims it did not foresee. Similarly, ALJ Carter is not permitted to assume, without supporting evidence that AFM's vague allegations in the charge related to the Oh Heck Yeah project.

With regard to the remaining projects – Amos Lee, Isakov, and Dona Nobis Pacem and Missa Mirabilis – CGC "does not dispute that the Orchestra Committee had notice, nor Respondent's assertions that the Orchestra is an agent of the DMA, which is, in turn, an 'affiliate' of the AFM." CGC Answer, p. 62. Rather, CGC alleges that notice to the Orchestra Committee does constitute notice to AFM. *Id.* Again, CGC's argument fails. Notice to the Orchestra Committee constitutes notice to AFM because members of the Orchestra Committee were heavily involved in bargaining for AFM. Indeed, ALJ Carter specifically found that

members of the Orchestra Committee attended the August 20, 2014 meeting and the bargaining session was delayed that day because "the AFM requested time to meet with the CSA musicians' Orchestra Committee before commencing bargaining." 21 ALJD 10-11, fn. 19. Likewise, ALJ Carter noted that Bartels was present for the June 2015 bargaining session. 29 ALJD fn. 23. Bartels was the Chair of the Orchestra Committee. Tr. 1518:14-23. Thus, even applying CGC's reasoning, the Orchestra Committee's knowledge and approval of these projects can properly be imputed to AFM because the Orchestra Committee members' were involved in bargaining with AFM. *See* CGC Answer, pp. 62-63.

CGC cannot simultaneously contend AFM and DMA are joint representatives and deny AFM is charged with any knowledge possessed by DMA or its agents. *See In Re Am. Med. Response, Inc.*, 335 NLRB 1176, 1179 (2001) (impugning one local's liability to another local because they were joint collective bargaining representatives). Indeed, because AFM exercises significant control over its members and DMA, it was improper for ALJ Carter to permit AFM to disclaim responsibility for its members' conduct. *See US W. Comm., Inc. v. C.W.A.*, 2000 WL 1700280 (D. Colo. July 21, 2000). Neither ALJ Carter nor CGC address this issue. The Decision must be reversed.

CONCLUSION

Based on the foregoing, CSA requests that the Board reverse ALJ Carter's Decision.

Respectfully submitted this 25th day of April, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on April 25th, 2017, a true and correct copy of the foregoing **RESPONDENT COLORADO SYMPHONY'S REPLY TO COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF** was E-filed with the NLRB E-Filing System and served via email to the following:

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